Supreme Court, U.S.
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No. 03-119

In The

Supreme Court of the United States

MARILYN I. ELLMAN,

Petitioner,

v.

WOODSTOCK #200 SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATUTE INVOLVED

28 U.S.C. § 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c) (1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for

comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

REASONS FOR DENYING THE WRIT

I. Introduction

> [W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.

McNeil v. United States, 508 U.S. 106, 113, 113 S.Ct. 1980, 1984, 124 L.Ed. 2d 21 (1993) (citations and footnotes omitted).

Rather than mounting legal arguments in support of her Petition for Writ of Certiorari, Petitioner Marilyn Ellman, who was twice sanctioned for frivolous actions in the courts below, predominantly repeats her underlying factual allegations although they are unnecessary to resolve her ten questions presented. As is her practice when appearing in a new forum, Petitioner restates for this Honorable Court unsupported allegations in her original complaint as well as unsupported allegations that were stricken from the record. Petitioner seeks to persuade this Honorable Court that she has been subjected to such atrocities at the hands of her employer, the Respondent Woodstock Community Unit School District No. 200, that justice can only be served if she, as a pro se litigant, is excused from evidentiary rules, procedural rules and the legal standards governing motions for summary judgment.

In this regard, Petitioner seeks to be the standard bearer for all pro se litigants who are not paupers but who cannot afford an attorney because they are of modest means.[1] The crux of Petitioner's Petition for Writ of Certiorari is that although litigants who are represented by counsel must abide by procedural and substantive rules for *summary judgment*, she has the wholesale discretion whether or not to investigate or abide by the same standards because of her choice to proceed pro se. Petitioner is plainly wrong. While pro se litigants are afforded some leniency when practicing in an unfamiliar forum, a litigant's choice to proceed pro se does not abrogate the requirement that procedural and substantive summary judgment rules must be followed.

Moreover, she was given adequate notice of the basic requirements for motions for summary judgment and an opportunity to correct her failure to comply. She chose not to comply with these basic procedural requirements and provides no support for being given a third chance. (Based upon her prior conduct, there are no grounds to believe

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[1] Ironically, Petitioner simultaneously informs this Court that she retained an attorney in a previous lawsuit and retained an attorney at the outset of the pending litigation who eventually withdrew for unstated reasons. (Petitioner's Petition for Writ of Certiorari, pp. 15, 23-24.) Petitioner is also gainfully employed by Respondent as a school psychologist and has consistently received a higher yearly salary than other psychologists employed by Respondent. (*Ellman v. Woodstock #200 School District*, 2001 U.S. Dist. LEXIS 2519, **6-7 (N.D. Ill. Feb. 26, 2001). Decision reproduced at Petitioner's Appendix C, pp. 16-17.) Accordingly, Respondent respectfully submits that, in light of her salary and the availability of an award of attorneys' fees to the prevailing party, Petitioner either freely chose not to retain counsel or she could not find counsel who would accept her case.

that she would comply with these requirements if given another opportunity to comply.)

Additionally, Petitioner seeks review of the U.S. District Court for the Northern District of Illinois' *Local Rule 54.3* that extends the 14-day timeline in *Fed. R. Civ. P. 54* within which a prevailing party may file a motion for fees and costs to a 90-day timeline. (Rules reproduced at Petitioner's Petition for Writ of Certiorari, pp. 4-5.) Petitioner argues that *Local Rule 54.3* is an impermissible procedural innovation and usurpation of congressional power. However, *Fed. R. Civ. P. 54* plainly states that the timeline may be modified by an order of the court. As an order of the court, *Local Rule 54.3* simply extended the time to file a fees motion as expressly permitted.

Moreover, Petitioner presents questions that were never raised before the United States Court of Appeals for the Seventh Circuit and were never addressed in the Seventh Circuit's decision.

The rules of law at issue have been well established by the United States Supreme Court and the Seventh Circuit. Petitioner simply disagrees with how the properly stated rules of law in issue are implemented in her lawsuit. No important questions of law are raised in the pending Petition for Writ of Certiorari and the Seventh Circuit's decision is not in conflict with well settled law. Therefore, the writ should be denied.

II. Pro Se Litigants Are Required to Follow the Procedural and Substantive Rules Governing Summary Judgment

Petitioner asks to extend the liberal pleading standard afforded to pro se litigants when initiating a lawsuit by relaxing a pro se litigant's obligations to conform with local rules and federal rules governing summary judgment. However, this Honorable Court previously clarified that the liberal interpretation afforded to a pro se plaintiff's complaint in order to avert a motion to dismiss should not be extended to a pro se litigant's burden to follow civil procedural rules. In *McNeil v. United States*, 508 U.S. 106, 113, 113 S.Ct. 1980, 1984, 124 L.Ed. 2d 21 (1993), this Honorable Court ruled "While we have insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed, . . . we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel" (citations and footnotes omitted). Writ of Certiorari also was denied to review an affirmed decision against a pro se litigant in which the District Court reiterated, "'although pro-se complaints enjoy a liberal interpretation, a pro-se litigant does not escape the essential burdens necessary to avert summary judgment.'" *Cavelieri-Conway v. L. Butterman & Assoc.*, 992 F.Supp. 995, 1000 n.3 (N.D. Ill. 1998) (*citing, Cabrera v. Peters*, 23 F.3d 410 (Table), 1994 W.L. 164528, at *2 (7th Cir. 1994)) *aff'd*, 172 F.3d 52 (Table) (7th Cir. 1999), *cert. denied*, 528 U.S. 847, 120 S.Ct. 121, 145 L.Ed. 2d 103 (1999).

As to the substantive standards governing summary judgments, this Honorable Court already has clearly articulated and consistently upheld its rulings in *Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2515, 91 L.Ed. 2d 202, 213 (1986) ("Rule 56(c) provides that the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law."); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed. 2d 265, 273 (1986) ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."); and followed in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986), outlining the factors a court must take into consideration when ruling on motions for summary judgment.

As with all summary judgments, the court must review both counseled and pro se litigants' records and all reasonable inferences drawn from the record in the light most favorable to the non-moving party. Petitioner apparently would have the standard for pro se litigants reduced to reviewing matters outside the record and all unreasonable inferences in the brightest light most favorable to the pro se litigant. There is simply no support for altering substantive summary judgment standards for pro se litigants and Petitioner offers scant argument in support of her own position.

Petitioner's only definable argument is that *Local Rule 56.1* is invalid because it is a basic procedural innovation that is in conflict with the standard in *Fed. R. Civ. P. 56*. (Rules reproduced at Petition for Writ of Certiorari, pp. 5-7 and 9-11.) Petitioner does not explain how she reached this conclusion. In any event, district courts are

bestowed with the power to prescribe rules for the conduct of their business, so long as the local rules are not inconsistent with the United States Constitution, a statute of the United States or with a national rule governing the conduct of litigation in the United States courts. *28 U.S.C. § 2071(a)*; *Fed. R. Civ. P. 83(a)*. (Statute reproduced above. Rule reproduced at Petition for Writ of Certiorari, p. 11-12.) Pursuant to this power, the U.S. District Court for the Northern District of Illinois promulgated *Local Rule 56.1* that governs the presentation of briefs, facts and supporting materials filed in support and against motions for summary judgment.

Fed. R. Civ. P. 56 governs, in part, the form that admissible evidence may take to support or oppose summary judgment. *Local Rule 56.1* does not conflict with *Fed. R. Civ. P. 56*. Rather, the local rule regulates the business of the District Court by further organizing the manner in which a party's evidence in support or against a motion for summary judgment must be presented. Without a conflict in the rules, Petitioner's argument fails completely. Therefore, this Petition for Writ of Certiorari respectfully should be denied.

III. Petitioner Was Provided Notice of the Rules Governing Summary Judgment and Had the Opportunity to Follow the Rules

The Seventh Circuit requires that all pro se litigants receive notice of the consequences of failing to respond to a summary judgment motion. *Timms v. Frank*, 953 F.2d 281, 285 (7th Cir. 1992), *rehrg denied*, (Jan. 28, 1992), *cert. denied*, 504 U.S. 957, 112 S.Ct. 2307, 119 L.Ed. 2d 228 (1992). Petitioner claims she did not receive this required notice. However, as expressly acknowledged by the lower

courts, Respondent satisfied well settled law in the Seventh Circuit when it notified Petitioner of her obligations and the consequences for non-compliance under both *Local Rule 56.1* and *Fed. R. Civ. P. 56.*

The Seventh Circuit stated that Petitioner failed to follow the local rules' summary judgment procedural requirements " . . . even after Woodstock informed her by letter of her failure to comply with Rule 56.1 and she moved for and was given an extension by the court to correct this deficiency." (*Ellman v. Woodstock #200 School District*, 59 Fed. Appx. 885, 886, 2003 U.S. App. LEXIS 3934, *3 (7th Cir. Mar. 5, 2003). Decision reproduced at Petitioner's Appendix A, p. 4.) The Seventh Circuit first noted the deference that the District Court paid to Petitioner as a pro se litigant by giving her an opportunity to fix her mistakes. However, Petitioner did not fix her mistakes. The District Court additionally ruled that Petitioner should not be given additional latitude in complying with the procedural rules, in part, because, " . . . the school district *in writing* specifically informed Ellman of her obligations under LR 56.1." (*Ellman v. Woodstock #200 School District*, 2001 U.S. Dist. LEXIS 2519, *3 (N.D. Ill. Feb. 26, 2001) (emphasis in original). Decision reproduced at Petitioner's Appendix C, p. 13.)

Fully informed and with a second chance at her doorstep, Petitioner chose to turn a blind eye to the local rules. Petitioner's choice is in step with her actions that led to sanctions in the District Court for refiling issues that were previously litigated and in the Seventh Circuit for filing a frivolous appeal. Petitioner is clearly capable of following procedural rules when she deems them worth following. For an example, this Honorable Court need not look any further than the procedural steps that Petitioner

followed in her Petition for Writ of Certiorari. In sum, the asserted error that Petitioner was not given appropriate notice of the rules governing summary judgment motions is contrary to the facts of this case as found by both the United States District Court for the Northern District of Illinois and the United States Circuit Court for the Seventh Circuit.

IV. Sanctions for Attorneys' Fees and Costs Were Awarded in Conformity with a Properly Stated Rule of Law

Fed. R. Civ. P. 54(d)(2)(B) plainly states, "*Unless otherwise provided by statute or order of the court*, the motion [for attorneys' fees and related non-taxable expenses] must be filed and served no later than 14 days after entry of judgment; . . . . " (Rule reproduced at Petition for Writ of Certiorari, p. 5, emphasis added.) The Seventh Circuit previously determined that a local rule is an order of the court for the purposes of *Fed. R. Civ. P. 54(d)(2)(B). Johnson v. Lafayette Fire Fighters Ass'n Local 472, et al.*, 51 F.3d 726 (7th Cir. 1995). The Seventh Circuit also ruled that a local rule can modify the filing period contained in the federal rule and not be in conflict with the applicable federal rule under *28 U.S.C. § 2071(a)* and *Fed. R. Civ. P. 83(a). Id.*, 51 F.3d at 729-30.

In solidarity with the Seventh Circuit, the Third, Fifth, Ninth and Eleventh Circuits (all the circuit courts that have addressed this issue) also ruled that a district court's local rules are orders of the court. *Planned Parenthood of Central New Jersey v. Attorney General of the State of New Jersey*, 297 F.3d 253, 260 (3d Cir. 2002), *collecting the following cases, Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc.*, 253 F.3d 1332, 1335 (11th Cir. 2001); *Walker v.*

City of Bogalusa, 168 F.3d 237, 239 (5th Cir. 1999); *Eastwood v. Nat'l Enquirer*, 123 F.3d 1249, 1257 (9th Cir. 1997).

As an order of the court, the U.S. District Court for the Northern District of Illinois' *Local Rule 54.3(b)* otherwise provides that, "Unless the court's order includes a different schedule for such filing, the motion . . . shall be filed and served no later than 90 days after the entry of the judgment or settlement agreement on which the motion is founded." It is a far stretch, if not frivolous, to argue that *Local Rule 54.3* usurps congressional power when Congress specifically drafted *Fed R. Civ. P. 54* to allow for modifications in the timeline.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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